83-1910

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING MATERIAL & DUMP TRUCK DRIVERS LOCAL NO. 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association,

Petitioner,

v.

TOYOTA LANDSCAPE COMPANY, INC. and SUN-LAND NURSERIES, INC., California corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal courts possess jurisdiction to decide questions concerning union representation?

2. Whether a union may be compelled, pursuant to Section 301(a) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185, to involuntarily represent its members during the life of a collective bargaining agreement?

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BUILDING MATERIAL & DUMP TRUCK DRIVERS LOCAL NO. 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
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BUILDING MATERIAL & DUMP TRUCK DRIVERS LOCAL NO. 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association ("Local 420"), respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment entered by that court on February 21, 1984, in *Toyota Landscape Company, Inc. and Sun-Land Nurseries, Inc., Californic corporations, Appel-*

lants and Cross-Appellees v. Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, Appellee and Cross-Appellant, Nos. 83-5644, 83-5659 and 83-6545.

OPINIONS BELOW

The opinion of the court of appeals in this case is reported at ____F.2d____ (9th Cir. 1984) and is reproduced in the Appendix to this Petition at pp. A1-A8. The district court's judgment was entered on January 12, 1983 and its Findings of Fact and Conclusions of Law were filed on January 11, 1983. They are reproduced in the Appendix at p. A16 and pp. A9 - A15 respectively.

JURISDICTIONAL STATEMENT

The opinion of the court of appeals was filed on February 21, 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947 as amended ("Act"), 29 U.S.C. §185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8(b)(1)(A) of the Act provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrian or coerce (A) employees in the exercise of their rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention or membership therein. . . .

Section 9(e)(1) of the Act states:

> (e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3), of a petition alleging they desire that such authority [requiring membership in a labor organization as a condition of employment] be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

STATEMENT OF THE CASE

A. Statement Of The Facts.

On December 26, 1979, Local 420 and the Southern California District Council of Laborers ("Laborers"), on behalf of its affiliated local unions, executed a Jurisdictional Agreement ("Agreement") setting forth each craft's respective jurisdiction in the landscape industry in Southern California. The Agreement required implementation as soon as possible and obligated the crafts to make every effort to modify their existing collective bargaining agreements in accordance with its terms and conditions.

The Agreement was consummated because for some time previously, the Laborers and Local 420 had been embroiled in a dispute concerning union representation of individuals employed in the landscape industry.

Since Local 420 at that time was signatory to collective bargaining agreements ("contracts") with employers in the landscape industry which recognized it as the sole and exclusive union representative for all their employees, including Respondents Toyota Landscape Company, Inc. and Sun-Land Nurseries, Inc. ("Employers"), it sent them a copy of the Agreement because the contracts were in violation of it.

From March of 1980 until January 29, 1981, Local 420 negotiated with the Employers for a new contract that would be consistent with the Agreement. The Employers successfully resisted Local 420's efforts in this regard.

During these negotiations, Local 420 did not believe that the Laborers were seriously attempting to implement the Agreement with companies signatory to contracts with them. Additionally, jurisdictional problems and disputes continued to exist and arise between the two (2) crafts.

As a result, Oliver Traweek ("Traweek"), Secretary-Treasurer and Chief Executive Officer of Local 420, concluded that the one-sided cooperation to enforce the provisions of the Agreement had gone on long enough and on January 29, 1981, he signed contracts with the Employers on behalf of Local 420 as the sole and exclusive collective bargaining representative. This conduct violated the Agreement he had earlier executed with the Laborers.

Approximately four (4) months after Traweek signed new contracts with the Employers, he was removed from union office for engaging in fiscal improprieties. As a result, on June 1, 1981, the Executive Board of Local 420,

its governing and elected body, appointed Richard Martino ("Martino") as interim Secretary-Treasurer.

Coincidentally, on the same day Martino assumed office, Local 420's legal counsel, who was also legal counsel for the Laborers, notified Local 420 that it could no longer continue to represent it because of the conflict of interest that existed between Local 420 and the Laborers in the landscape industry.

Upon assuming office, Martino immediately became aware that numerous and serious problems existed between Local 420 and the Laborers regarding strikes, jurisdictional disputes and honoring each other's picket lines. Aware of the Agreement Traweek had earlier consummated with the Laborers and because he desired to improve Local 420's working relationship with them, Martino disclaimed interest in representing those employees and union members who worked for companies in jobs that fell within the Laborers' jurisdiction in the hope that, by doing so, the two (2) crafts would begin to cooperate with one another in future contractual negotiations and honor each other's picket lines.

Accordingly, Martino sent a letter to the affected companies, including the Employers herein, informing them that Local 420 no longer desired to represent their employees for purposes of collective bargaining which, in essence, meant that it would no longer service and administer the earlier contracts Traweek had executed with them on behalf of Local 420.

Local 420 acted consistently with the disclaimer subsequently thereafter.

Approximately ten (10) days after the disclaimer was mailed, the Employers filed unfair labor practice charges against Local 420 with the National Labor Relations Board ("NLRB") complaining that the disclaimer of

interest and Local 420's resultant refusal to honor its contractual obligations constituted a violation of Section 8(b)(1)(A) and other provisions of the Act.

The NLRB later dismissed the charges as lacking in merit. The Employers appealed the NLRB's dismissal to the Office of the General Counsel of the NRLB. Thereafter, the Office of the General Counsel informed the Employers that their appeal was denied, relying upon *Corrugated Asbestos Contractors v. N.L.R.B.* 458 F.2d 683 (5th Cir. 1972) and *Dycus v. N.L.R.B.*, 615 F.2d 820 (9th Cir. 1980).

Still dissatisfied, the Employers filed a Motion for Reconsideration with the General Counsel which was considered but denied.

After Local 420's disclaimer of interest, the disclaimed employees joined another union who negotiated and executed new collective bargaining agreements with the Employers.

At no time did the Employers contend that their prior collective bargaining agreement with Local 420 constituted a contract bar or prevented a successor union from representing their employees until it expired.[1]

B. Proceedings Below.

Shortly after the NLRB's refusal to declare Local 420's disclaimer violative of the Act, the Employers filed a breach of contract action in the district court for the Central District of California on July 10, 1981 against Local 420, asserting jurisdiction under Section 301 of the

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[1]It is clear that if they had, the NLRB would have possessed exclusive jurisdiction to entertain the claim. *See Confederated Independent U. v. Rockwell-Standard Company*, 465 F.2d 1137, 1141 (3rd Cir. 1972).

Act. Their claim was premised entirely upon the validity of the disclaimer.

On December 15, 1982, upon the completion of trial on the issue of liability, the district court found in favor of Local 420, correctly concluding that the disclaimer was lawfully tendered in good faith for legitimate business reasons.

Upon the Employers appealing the district court's judgment, Local 420 filed a cross-appeal, contending that the district court erred in holding that it possessed subject matter jurisdiction to adjudicate the Employers' breach of contract claim.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's decision that its jurisdiction to adjudicate the matter was not preempted by the NLRB[2] but reversed its holding that Local 420 had not violated Section 301 of the Act by disclaiming interest.

Ironically, after announcing that the NLRB did not possess exclusive jurisdiction to decide the dispute, the

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[2]The Ninth Circuit primarily relied upon *Northern California District Council of Hod Carriers v. Opinski*, 673 F.2d 1074 (9th Cir. 1982), for this proposition. The court's reliance upon *Opinski* misses the mark because it only declared that a court may stay an action to compel arbitration pending the resolution of a related claim before the NLRB.

The court below also unpersuasively attempted to distinguish one (1) of its earlier decisions where jurisdiction was not found to have existed, *Glaziers & Glassworkers Local 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339 (9th Cir. 1982), because in *Glaziers*, the party contesting jurisdiction was not seeking to interpret the contract but rather to avoid it whereas, in this case, the dispute hinged exclusively upon whether its disclaimer of interest entitled Local 420 to repudiate an otherwise valid agreement.

Local 420 believes that in both cases, the reviewing court was not concerned with the interpretation of the contract but if the refusing party was legally obligated to comply with it.

Ninth Circuit relied exclusively upon NLRB-generated precedent in concluding that Local 420's disclaimer of interest was unlawful and violated Section 301 of the Act because it was tendered during the life of the contract.

REASONS FOR GRANTING THE WRIT

1. The Conflict Between the Court of Appeals' Decision and Other Decisions Holding That the NLRB Possesses Exclusive Jurisdiction To Decide Questions Concerning Representation Presents an Important Issue of the Proper Role of Federal Courts in Section 301 Actions.

Acknowledging that this case dealt exclusively with the validity of Local 420's good faith decision to no longer represent certain union members for purposes of collective bargaining, the court below, contrary to the NLRB, held that the disclaimer was unlawful and Local 420 was liable for damages because, consistent with the disclaimer, it failed to enforce the contracts it had earlier executed with the Employers on behalf of its disclaimed members.

In concluding that, as a matter of law, Local 420 should have remained the employees' bargaining representative for the duration of the contract, the court below apparently forgot that the Act vests exclusive authority in the NLRB to pass upon questions concerning representation.[3]

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[3]The NLRB's exclusive jurisdiction in this case is overwhelmingly demonstrated by the fact that practically every judicial inquiry on the subject of the validity of a union's disclaimer of interest has involved a court of appeals review of an NLRB order addressing the matter. *See e.g., Dycus, supra; Corrugated Asbestos Constructors, Inc., supra;* and *N.L.R.B. v. Circle A & W Products Co.*, 647 F.2d 924 (9th Cir. 1980), *cert. denied*, 454 U.S. 1054 (1982). *But see Sanceverino v. Teamsters Union Local 445*, 510 F.Supp. 590, 594 (S.D. N.Y. 1981), where, after failing to prevail before the NLRB, a disclaimed employee unsuccessfully advocated before the district court that the union breached its statutory duty of fair representation in disclaiming interest.

Congress intended that courts not function as the primary tribunals for adjudicating issues arising under Sections 7 and 8 of the Act. Such issues are generally within the exclusive competence of the NLRB. *San Diego Building Trades Council v. Garmon,* 369 U.S. 236, 245 (1959). This doctrine of primary jurisdiction is a recognition of congressional intent to have matters of national labor policy decided in the first instance by the NLRB and if a question is raised concerning identity or the continued status of the employees' collective bargaining representative, it concerns a representational rather than a contractual matter and courts should defer to the expertise of the NLRB on the subject. *In accord, N.L.R.B. v. Warrensburg Board & Paper Corporation,* 340 F.2d 920, 924 (2d Cir. 1964); *West Point-Pepperell v. Textile Wkrs. U. of America,* 599 F.2d 304, 307 (5th Cir. 1977) ("Congress vested the NLRB with the exclusive authority to make the factual finding regarding the representative status of labor organizations. It is clear that wherever there is a change in the representation of a union, the Board, and not the courts, is the proper body to reassess the change."); *Local No. 3-193 Intern. Woodworkers v. Ketchikan Pulp,* 611 F.2d 1295, 1298-99 (9th Cir. 1980); *Glaziers, supra,* 689 F.2d at 1343 ("[L]itigation of a representation issue in the first instance in a section 301 action conflicted with a strong policy of judicial deference to initial determination by the NLRB of representation issues, such as the selection of the exclusive bargaining agent. . . ."); and *Local Union 204, etc. v. Iowa Elec. Light, etc.,* 668 F.2d 413, 416-19 (8th Cir. 1982) ("[W]e are unable to find any case in which this rule [Section 301 jurisdiction] has been held to apply to representational matters within the Board's jurisdiction. . . . Instead, representational matters have been almost invariably processed administratively through the NLRB . . . with judicial review of the Board's determination by the court of appeals. . . .") *Id.* at 416.

Compare Franks Bros. Co. v. N.L.R.B., 321 U.S. 702, 705-06 (1944), where this court held that "the Board [NLRB] may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

The court below held that it possessed jurisdiction to compel Local 420 to involuntarily represent certain members for purposes of collective bargaining. In doing so, it violated the important federal labor law policy of deferring to the NLRB and its established and orderly review of representational issues.

Unless this Court reviews and corrects the Ninth Circuit's decision in this regard, it will serve as a beacon for other courts to enmesh themselves in representational disputes resulting in a tangled and confused web of judicial and administrative conflict.

2. The Court of Appeals' Decision That a Union May Be Compelled To Involuntarily Represent Its Members During the Life of a Contract Raises an Important Question of Federal Labor Law Which Should Be Resolved By This Court.

In the hope of stabilizing industrial relations and fostering labor peace, Congress passed Section 301 with the intent that labor unions be held responsible for complying with contracts legally entered into that result from collective bargaining. In an attempt to insure that unions would respect and honor their contractual commitments, Congress provided a legal mechanism (Section 301) for companies to seek redress for damages if a union engaged in a work stoppage or strike in violation of the contract because, in its opinion, the *quid pro quo* for a company entering into a contractual relationship with a

union should be the reasonable expectation that during the life of the contract, its business operations would continue uninterrupted without the constant fear of the union striking.[4] *See* Legislative History of the Labor-Management Relations Act of 1947, Vols. I and II, pp. 422 and 1146 (1948).

But providing companies with a judicial remedy for monetary damages if a union strikes in violation of the contract, the expressed purpose of Section 301, is a far cry from forcing a labor union against its will to represent its members during the life of the contract even though its desire not do so do is motivated in good faith for legitimate business reasons.

Although Section 301 authorizes federal courts to develop federal common law concerning the enforcement of collective bargaining agreements, *Textile Wkrs. Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), it must be "fashion[ed] from the policy of our national labor laws," *Id.* at 456, and where, as here, no express statutory provision exists, the dispute must "be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.* at 457. This, Local 420 submits, the court below failed to do in announcing that a labor union can be judicially compelled to represent its members against its legitimate wishes during the life of a contract. In doing so, the lower court forgot that a party's freedom of contract is not absolute under the Act and "[v]arious practices in enforcing the Act may to some

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[4]It is obviously true that if unions could strike or engage in work stoppages at will, companies would be less inclined to enter into contractual relationships with them. But, contrary to the lower court's conjecture, allowing a union to disclaim interest during the life of a contract would have no impact on this decision because a vast majority of companies prefer that their employees not be represented by a union.

extent limit freedom to contract as the parties desire." *H.K. Porter Company v. N.L.R.B.*, 397 U.S. 99, 109 n. 6 (1970). For as this Court recently announced,

> ' "[t]he power of the federal court to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.' " *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 80 (1982), *quoting Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

In announcing that a company can require a union to represent its employees against the union's wishes, the court below failed to acknowledge that a union/member relationship is a voluntary one with both sides, under appropriate circumstances, entitled to terminate it even if contrary to the sentiments of the other.

For example, if a union is decertified by a majority of the employees in the bargaining-unit and another union is later certified by the NLRB as the new collective bargaining representative, the successor union is not bound by and need not administer the collective bargaining agreement executed by the decertified union even if it had not yet expired. *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 284 n. 8 (1972).

Furthermore, under appropriate circumstances, employees possess the statutory right to petition the NLRB for an election for the purpose of rescinding their union's right to enforce union security that had previously been contractually negotiated. [*See* Section 9(e)(1) of the Act.] Although Congress expressly provided that employees

could rescind their previously given approval to join a union as a condition of employment, the court below does not believe that a union possesses a corresponding prerogative.[5]

Thus, the court of appeals' decision stands for the proposition that if a union is bordering on financial insolvency; signs a contract containing a union security clause that is later repudiated by a majority of the employees;[6] desires to promote harmony with another union; is ordered by its international union to relinquish certain jurisdiction; or wishes to divorce itself from employees who engage in an unauthorized or unlawful strike in order to avoid liability, it cannot do so and must continue to enforce and administer the contract until it expires.

Prior to the decision below, every administrative and judicial body that has examined a union's disclaimer of interest has declared that a union can validly cease representing its members for purposes of collective bargaining even if it chooses to do so during the life of a contract.

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[5]It did, however, correctly recognize that a union cannot dictate that a successor bargaining representative be substituted in its place absent an approving vote by a majority of the affected employees. But Local 420 in this case did not attempt to force another union down the throats of the employees. Rather, it merely informed the employees that, if they wanted continued union representation, they must look elsewhere.

[6]This court has recently remarked that "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders-employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, ____U.S. ____, No. 82-1150 (April 25, 1984).

Under the decision below, a union could conceivably be forced by a company to represent "free riders" against its will for the duration of the contract which could seriously drain the union's treasury.

As indicated hereinabove, this question has almost exclusively been addressed by the NLRB in the application of its contract bar rule or in an unfair labor practice proceeding against the disclaiming union. The contract bar rule comes into play when a successor union desires to represent employees earlier represented under contract by a disclaiming union at a time when the contract has not yet expired. In such situations, the company usually resists the organizing efforts of the successor union.

In deciding whether the predecessor union's disclaimer of interest and the contract it executed with the company should bar a subsequent election sought by a successor union during the life of the contract or whether the disclaimer was violative of the Act, the NLRB has often evaluated the circumstances surrounding the disclaimer and the reasons and motivations for it. In doing so, the NLRB has both relied upon the disclaimer[7] and ordered an election and rejected it,[8] holding that the contract the company executed with the predecessor and disclaiming union served as a bar to any subsequent representational proceedings instituted by a rival or successor union during the life of the contract.[9]

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[7]*See e.g., Miratti's, Inc.*, 132 NLRB No. 48 (1961); *Corrugated Asbestos Contractors*, 192 NLRB No. 8 (1971), *enfd.* in *Corrugated Asbestos Contractors, supra; Steinmetz Elec. Contractors Assn.* 234 NLRB No. 106 (1978); and *American Sunroof Corp.*, 243 NLRB No. 172 (1979).

[8]*See e.g., Texlite, Inc.*, 119 NLRB No. 232 (1958), *enfd.* 266 F.2d 349 (5th Cir. 1959); *Mack Trucks*, 209 NLRB No. 164 (1974); and *East Mfg. Corp.*, 242 No. 5 (1979).

[9]This is why the lower court's reliance upon *Circle A & W Products Co., supra; Mack Trucks, Inc., supra;* and *East Mfg. Corp., supra,* is misplaced. They all deal with the NLRB's contract bar rule.

In those cases, the NLRB struck a balance between the need to preserve industrial stability [the company's reliance upon the contract with the disclaiming union] and the need to afford employees a

But in none of these cases has the NLRB ever pronounced that the disclaiming union must continue to represent the employees because to do so would be forcing a union to continue, contrary to its wishes, a relationship that is, by its very nature, predicated upon the consent and voluntariness of *both* parties. *In accord, Arnold & Jeffers, Inc.*, 195 NLRB No. 27 (1972) ("[T]he employees . . . cannot be compelled to bargain in a unit not to their liking, nor can Respondents [the unions] be compelled to represent them in such a unit."); *Steinmetz Elec. Contractors Assn., supra* ("this Board cannot compel a union to represent employees it no longer desires to represent. . . ."); and *Grinnell Fire Protection Systems,* 235 NLRB No. 156 (1978), *enfd.* in *Dycus, supra,* where the NLRB explained:

> "Depriving the unit of the benefits of the collective bargaining agreement by withdrawing as representative can be coercive as a matter of law only if the unit has a continuing right to those benefits. And if the unit has that right it can only be because a collective-bargaining representative has that duty. . . . Withdrawl is not a breach of the duty of fair representation. For that duty is the corollary to an exclusive representative's power and authority. [Footnote omitted.] The representative having disclaimed that power and authority, the predicate for the duty fails."

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reasonable opportunity to choose a new collective bargaining representative who, contrary to the disclaiming union, wants to represent them.

They do not stand for the proposition that although Congress, through the NLRB, has provided employees the opportunity during the life of a contract to reappraise the choice of and, if they desire, change their representative, a union is not afforded a similar opportunity.

A union's decision to disclaim interest, whether a contract is in effect at the time or not, is an internal union matter protected by the proviso to Section 8(b)(1)(A) of the Act. By deciding that a union cannot disclaim interest, the court below infringed upon a matter of internal union policy that Congress proclaimed should not be impaired. *In accord, Sancereno v. Teamsters Local 445, supra.*

Judicial treatment of this subject prior to the decision below has been consistent with the NLRB's.

In *Corrugated Asbestos Contractors, Inc. v. N.L.R.B. supra,* the Fifth Circuit concluded that a union's disclaimer of interest was lawful and tendered in good faith because the union did not want to become continuously embroiled in jurisdictional disputes, the same reason advanced by Local 420 and credited by the district court[10] in this case.

> "We cannot force a union to continue, against its wishes, a relationship that is in its very nature predicated upon voluntariness and consent. *See H.K. Porter Co. v. N.L.R.B.*, 1970, 397 U.S. 99, 102-109, 90 S.Ct. 821, 25 L.Ed.2d 146." 458 F.2d at 687.

Similarly, in *Dycus v. N.L.R.B., supra,* the Ninth Circuit held that a union could disclaim interest during the life of a contract if it did so unequivocally and in good faith. 615 F.2d at 826.

The court below attempted to distinguish its earlier holding in *Dycus* by emphasizing that *Dycus* dealt with a disclaiming union's duty of fair representation to its

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[10]Since the court below concluded that Local 420's disclaimer of interest was invalid as a matter of law because it resulted in the union repudiating its collective bargaining obligations, it did not address the district court's finding that it was tendered in good faith for legitimate business reasons.

members whereas this case deals with a union's contractual obligations to employers during the life of a contract.

If a union is forced under Section 301 to administer and enforce the contract upon disclaiming, it also holds true that it must continue to function as the exclusive collective bargaining representative and is obligated to fully and fairly represent its members whose terms and conditions of employment are governed by the contract. Thus, *Dycus* and the decision below conflict and cannot be reconciled.

Congress, in passing Section 301, did not want unions signatory to lawful contracts to engage in work stoppages and strikes in violation of their contractual obligations. But Congress did not intend that Section 301 be used as a tool to compel a union to continue administering a contract and representing members if it no longer in good faith for legitimate business reasons wanted to do so.

A union's decision to represent or not represent a group of employees is an internal matter that should only be scrutinized by the NLRB under appropriate circumstances.

To guarantee that federal courts not impair the rights of labor unions and the jurisdiction of the NLRB in this regard, Local 420 respectfully urges that the Court grant this petition and, upon review, reverse the decision below.

CONCLUSION

For all the reasons set forth above, Petitioner respectfully requests that a writ of certiorari be issued to review the decision of the court of appeals in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOYOTA LANDSCAPE COMPANY, INC., and SUN-LAND NURSERIES, INC., California corporations,

Appellants,

v.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association,

Appellee.

No. 83-5644

DC No. CV 81-3426-KN

TOYOTA LANDSCAPE COMPANY, INC., and SUN-LAND NURSERIES, INC., California corporations,

Appellees,

v.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, an unincorporated association,

Appellant.

No. 83-5659

DC No. CV 81-3426-KN

TOYOTA LANDSCAPE COMPANY, INC. and SUN-LAND NURSERIES, INC., California corporations,

Appellants,

v.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association,

Appellee.

No. 83-6545

DC No. CV 81-3426-KN

OPINION

APPENDIX A

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding
Argued November 8, 1983

Before: GOODWIN and ANDERSON, Circuit Judges, and KING*, District Judge

GOODWIN, Circuit Judge

Two landscape employers appeal the dismissal of their action for breach of contract filed under 29 U.S.C. § 185(a) against Local 420 and an action for "conspiracy to breach contract" against Local 420 and and two other unions. Originally four landscapers sought damages, specific performance, punitive damages, attorneys' fees and costs. The trial court dismissed the conspiracy claim with prejudice. The claims for punitive damages and attorneys' fees were also stricken. One landscaper was dismissed from the action with prejudice. After a two-day trial on liability, the court found for Local 420. Only two landscapers appeal.

From 1978 to March 1980 the landscapers had collective bargaining agreements with Local 420. In December 1979 the Teamsters and Laborers unions made a jurisdictional agreement. In contract negotiations with landscapers in early 1980, Local 420 and the Laborers were represented by the same attorney. Pursuant to the jurisdictional agreement, Local 420 would negotiate only for employees who drove trucks, while the Laborers would represent other employees. Negotiations broke off. However, in early 1981, Local 420 executed a three-year collective bargaining agreement with landscapers covering

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*The Honorable Samuel P. King, Chief Judge, United States District Court for the District of Hawaii, sitting by designation.

all employees. Landscapers argue that Local 420 made the 1981 agreement pursuant to a modification of the jurisdictional agreement between itself and the Laborers. Both sides agree that Local 420 was dissatisfied with Laborers' compliance with the jurisdictional agreement.

Oliver Traweek, the Local 420 official who executed the agreement, was removed from office by the Teamsters for engaging in "fiscal improprieties." Richard Martino, who had lost to Traweek by three votes in the previous election for Secretary-Treasurer, was appointed to replace Traweek. Landscapers assert that because Martino feared Traweek would become eligible to run against him in the next election, and because Martino learned that 400 votes of landscaping employees had been illicitly voted against him in the last election, Martino disclaimed interest in representing the landscaping employees, thereby disenfranchising them. Landscapers assert that the employees objected, in part because they would lose their time investment in the Teamsters' pension fund. Local 420 asserts that Martino disclaimed interest in representing the employees in the hope of improving relations with the Laborers. Local 420 admits that Martino disclaimed interest without consulting the Laborers.

As a result of the union's disclaimer of interest, landscapers claimed damages in their complaint because, by virtue of working for general contractors required to contract only with subcontractors using union labor, landscapers were forced to pay higher wages to non-Teamster labor than they would have paid under their collective bargaining agreements with Local 420.

1. JURISDICTION

Landscapers claimed jurisdiction in district court under section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Local 420 contested jurisdiction by motions to dismiss and motions for summary judgment, claiming that exclusive jurisdiction rested with the N.L.R.B. The trial court properly denied Local 420's motions. *Northern California District Council of Hod Carriers v. Opinski,* 673 F.2d 1074 (9th Cir. 1982). The N.L.R.B. and district court share concurrent jurisdiction over cases legitimately involving both unfair labor practice charges and breach of collective bargaining agreement claims. Although the N.L.R.B. administratively determined that landscapers' unfair labor practice claims were without merit (a determination within its primary jurisdiction), under *Opinski* there is no bar to district court jurisdiction to pass on the breach of collective bargaining agreement claims. Indeed, section 301 authorizes federal courts to develop a federal common law regarding enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957); *Hendricks v. Airline Pilots Association,* 696 F.2d 673, 676 (9th Cir. 1983). Case law is to be fashioned from the policy of national labor laws. *Id.* Accordingly, jurisdiction in the district court was proper. *Glaziers & Glassworkers Local 767 v. Custom Auto Glass Distributors,* 689 F.2d 1339 (9th Cir. 1982), does not support Local 420 in objecting to district court jurisdiction. *Glaziers* notes that section 301 was intended to permit federal court jurisdiction in disputes that focused on the terms of the collective bargaining agreement.

In the instant case, breach of contract, specifically of the no strike provision, between landscaper employers and Local 420, a labor organization, has been alleged as required by *Painting & Decorating Contractors Association v. Painters & Decorators Joint Committee,* 707 F.2d 1067, 1070-1071 (9th Cir. 1983) and cases cited therein. *Glaziers'* finding against district court jurisdiction must be read in the context of the facts. In *Glaziers,* employers were trying to avoid an agreement by arguing that the union did not represent a majority of employees when the agreement was made. That is exactly the kind of question over which the N.L.R.B. has primary jurisdiction. In the instant case the issue is whether the union breached an admittedly valid agreement. That is the kind of common law question that courts traditionally decide. It is also noteworthy that in its nonevidentiary administrative proceeding, the N.L.R.B. determined only that there was no unfair labor practice; it did not reach the breach of contract issue. Local 420 asserts additional arguments in objecting to subject matter jurisdiction in the district court, but none that deserves comment.

2. CONSPIRACY

Initially, in responding to Local 420's motion to dismiss landscapers' claim for "conspiracy to breach the contract," the trial judge granted the dismissal without prejudice. During that hearing the trial judge informed landscapers that they could file an amended complaint. When they did not, the trial judge dismissed the claim with prejudice.

"In the final analysis, the court of appeals will overturn a district court's dismissal pursuant to Rule 41(b) only where it is apparent that the court abused its discretion. [citations]" *Schmidt v. Herrman,* 614 F.2d 1221, 1224 (9th Cir. 1980), *accord Nevijel v. North Coast Life Insurance Co.,* 651 F.2d 671 (9th Cir. 1981). Because of

landscapers' failure to amend, there was no abuse of discretion.

3. BREACH OF CONTRACT

The trial court erred in finding that Local 420's disclaimer of interest was lawful because tendered in good faith for legitimate business reasons. Good faith is not the correct test. Sound policy reasons counsel against local unions repudiating contractual obligations whether to promote harmony with other unions or to resolve some intra-union political dispute. In view of the 29 U.S.C. §185(a) authorization to the federal courts to develop federal common law (based on the policies of national labor laws) we choose the rule that will promote the enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957); *Hendricks v. Airline Pilots Association,* 696 F.2d at 676; *Rehmar v. Smith,* 555 F.2d 1362, 1366-67 (9th Cir. 1976).

The good faith standard used by the trial court apparently comes from *Dycus v. N.L.R.B.,* 615 F.2d 820 (9th Cir. 1980), dealing with an employee's grievance for being involuntarily transferred from one Teamster local to another. Good faith was an appropriate inquiry in *Dycus* but the facts in *Dycus* are distinguishable from those in the instant case. Here, Local 420 has effectively repudiated the collective bargaining agreement by disclaiming interest in representing all the employees covered. *Dycus* dealt with a union's duties to its members, not with fulfillment of its contractual obligations to other contracting parties.

The no-strike section of the three-year collective bargaining agreement between Local 420 and landscapers provides that the union shall not engage in any "kind of activity that interferes with or interrupts the Company's operations. . . ." Landscapers propose essentially three

policy reasons why the union should not be allowed to breach this provision.

First, under *Hendricks,* 696 F.2d at 676, collective bargaining pursuant to the Labor Management Relations Act is not just a mechanism of private agreement, but rather an instrument of government. Moreover, the unilateral disenfranchisement of the landscapers' employees defies the policy that employees should have freedom of choice in selection of their bargaining agent. The N.L.R.B. has repeatedly stressed the importance of employees voting on changes in union jurisdiction. In these cases, employers also have successfully protested the lack of a vote. *Gas Service Co.,* 213 N.L.R.B. 932 (1974); *Carriage Oldsmobile Cadillac, Inc.,* 210 N.L.R.B. 620 (1974); *Gulf Oil Corp.,* 135 N.L.R.B. 184 (1962).

Second, allowing Local 420 to walk away from its agreement disrupts industrial stability, a value proclaimed by *N.L.R.B. v. Circle A & W Products Co.,* F.2d 924, 926 (9th Cir.) *cert. denied,* 454 U.S. 1054 (1981). In fact, Local 420's disclaimer has caused substantial disruption for landscapers because they have had to employ non-Teamster union labor.

Third, permitting Local 420 to escape its bargain impugns the integrity of the collective bargaining process. In *Mack Trucks, Inc.,* 209 N.L.R.B. 1003 (1974), the Board stated that even though it had a policy in representation proceedings of attempting to accommodate "no-raiding" agreements, it would be contrary to the principle of the Act for a union to disclaim interest in a contract for the purpose of avoiding its terms. *Accord East Manufacturing Corp.,* 242 N.L.R.B. 5 (1979). To permit the union to repudiate its bargain is unfair and would make it more difficult for similar bargains to be struck in the future.

For these reasons, we hold as a matter of law that Local 420's disclaimer violated the collective bargaining agreement. Under this standard it does not matter whether Local 420's disclaimer was for the "good faith" motivation of improving relations with the Laborers or for the "bad faith" motivation of an internal power struggle. The case is remanded for further proceedings on the issue of damages. We need not reach the question whether the trial court should have reopened the case pursuant to Fed. R. Civ. P. 60(b) as the matter is moot.

Reversed and remanded.

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ATTORNEYS FOR Defendant Building Material & Dump Truck Drivers, Local No. 420

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOYOTA LANDSCAPE CO., INC.; SUN-LAND NURSERIES, INC.; et al.,

Plaintiffs,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL 420, IBTCHWHA; et al.,

Defendants.

NO. CV-81-3426-Kn (Tx)
FINDINGS OF FACT AND CONCLUSIONS OF LAW
[Tried on December 14-15, 1982 At 9:30 A.M.]

The court, having tried the above matter without a jury on December 14 and 15, 1982, makes the following Findings of Fact and Conclusions of Law upon proof during the time of trial.

FINDINGS OF FACT

I.

On December 26, 1979, Joint Council of Teamsters No. 42, on behalf of its affiliate Local Unions in Southern California, including Teamsters Union Local No. 420, and the Southern California District Council of Laborers, on behalf of its affiliated Local Unions, entered into a Jurisdictional Agreement setting forth each Unions' respective jurisdiction covering the landscape industry in Southern California.

II.

The parties expressly agreed to implement the Jurisdictional Agreement as soon as possible and, more specifically, to make all efforts to modify existing collective bargaining agreements to be in accordance with the Jurisdictional Agreement.

III.

George Hall, Recording Secretary of Joint Council of Teamsters No. 42 and Oliver Traweek, Chairman of the Southwest Construction and Building Material Council and then Secretary-Treasurer and Chief Executive Officer of Teamsters Union Local No. 420, signed the Jurisdictional Agreement on behalf of the Teamsters Unions.

IV.

On or about January 29, 1981, Oliver Traweek, as Secretary-Treasurer of Teamsters Union Local No. 420, signed collective bargaining agreements with the three (3) Plaintiffs herein who were then engaged in the landscape industry and directly affected by the above-mentioned Jurisdictional Agreement earlier negotiated and entered into by the Teamsters and Laborers Unions.

V.

Article 2 of said collective bargaining agreements indicates that Teamsters Union Local No. 420 was recognized by the Plaintiffs as the sole and exclusive collective bargaining agent for all employees working for said employers as "production employees, lead employees and foremen."

VI.

By entering into the above-mentioned collective bargaining agreements, Teamsters Union Local No. 420 violated its earlier-consummated Jurisdicitonal Agreement with the Laborers Union.

VII.

On June 1, 1981, Mr. Traweek was suspended from Union membership by Joint Council of Teamsters No. 42 as a result of its adjudication of intra-Union charges for engaging in certain fiscal improprieties. As a result of his suspension from Union membership, he could no longer function as an officer of the Local Union because he was no longer a member of Local 420 in good standing. As a result, as of that date, the Executive Board of Teamsters Union Local No. 420, its governing elected body, appointed Richard D. Martino as interim Secretary-Treasurer of the Local Union.

VIII.

On June 1, 1981, the date Mr. Martino assumed office, Local 420's legal counsel at that time, who, at the same time, was also legal counsel to the Laborers Unions in Southern California, informed Mr. Martino's predecessor in office, Oliver Traweek, by letter, that they could no longer represent Local 420 because of the conflicts of interest between Local 420 and the Laborers Unions that had arisen over the landscape industry.

IX.

After reviewing the above letter from Local 420's legal counsel and discussing the situation with employees of Local 420, Mr. Martino became aware of the fact that numerous problems existed between Local 420 and the

Laborers Unions concerning strikes, jurisdictional disputes and honoring picket lines at jobsites. Because of these problems and Mr. Martino's desire to obtain a better working relationship with the Laborers Unions, he decided to disclaim interest in representing the individuals who worked for those employers in jobs that fell within the Laborers Unions' jurisdiction hoping that it would improve Local 420's relationship with the Laborers Unions to the point where the respective Unions could cooperate in future contractual negotiations and honor each other's respective picket lines.

X.

Accordingly, on or about June 10, 1981, Mr. Martino sent a letter to the three (3) Plaintiffs herein informing them that Local 420 no longer desired to represent their employees for purposes of collective bargaining.

XI.

Prior to making that decision and implementing it, Mr. Martino did not contact nor discuss the decision with representatives of the Laborers Unions.

XII.

Since Local 420 disclaimed interest in representing the individuals employed by the three (3) Plaintiffs herein, it has done nothing inconsistent with that disclaimer of interest.

XIII.

On or about June 22, 1981, a representative of the three (3) Plaintiffs herein filed unfair labor practice charges with the National Labor Relations Board against Local 420 complaining that Local 420's disclaimer of interest

and refusal to continue to honor its contractual obligations with the Plaintiffs constituted unfair labor practices.

XIV.

On or about July 24, 1981, the National Labor Relations Board informed the Plaintiffs' representative that it was dismissing the unfair labor practice charges filed against Local 420 because Local 420's disclaimer of interest and termination of the collective bargaining agreements did not violate the National Labor Relations Act, as amended, or constitute an unfair labor practice.

XV.

The resolution of the Plaintiffs' allegations in this proceeding would not require the determination as to whether an unfair labor practice occurred when Local 420 disclaimed interest and subsequently repudiated its collective bargaining obligations or result in this Court considering and passing upon questions of representation and determination of appropriate bargaining units.

XVI.

The legality of the Plaintiffs' breach of contract action in this case is premised entirely upon the validity of Local 420's disclaimer of interest.

XVII.

To the extent that any Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

From the following Facts, the Court makes the following Conclusions of Law:

I.

To the extent that any Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law.

II.

The issue confronting this Court in this proceeding is whether Local 420's decision to disclaim interest was lawful thereby excusing it from continuing to honor the collective bargaining agreements at issue in this proceeding.

III.

This court possesses subject matter jurisdiction to adjudicate that issue in this proceeding irrespective of the conduct mentioned hereinabove engaged in by the National Labor Relations Board concluding that Local 420's disclaimer of interest and repudiation of the collective bargaining agreements did not constitute unfair labor practices.

IV.

This Court possesses subject matter jurisdiction to adjudicate this proceeding pursuant to Section 301 of the Labor-Management Relations Act, as amended.

V.

Local 420's disclaimer of interest was lawful, non-discriminatory and tendered in good faith for legitimate business reasons.

VI.

Judgment shall be entered in favor of Defendant TEAMSTERS UNION LOCAL NO. 420 and against the Plaintiffs and said Defendant shall be awarded all costs incurred in defense of this action.

DATED: January 11, 1983

David V. Kenyon

UNITED STATES DISTRICT COURT JUDGE

J-6

ATTORNEYS FOR Defendant Building Material & Dump Truck Drivers, Local No. 420

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOYOTA LANDSCAPE CO., INC.; SUN-LAND NURSERIES, INC.; et al.,

Plaintiffs,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL 420, IBTCHWHA; et al.,

Defendants.

NO. CV-81-3426-Kn (Tx)

JUDGMENT

[Tried on December 14-15, 1982 At 9:30 A.M.]

This cause having been tried before the Court without a jury on December 14 and 15, 1982, the Court, by reason of the Findings of Fact and Conclusions of Law filed simultaneously herewith,

ORDERS, ADJUDGES AND DECREES that Judgment shall be entered in favor of Defendant and against the Plaintiffs and said Defendant shall be awarded all costs incurred herein in defense of this action.

DATED: January 11, 1983

Harold V. Ryan

UNITED STATES DISTRICT COURT JUDGE

Taxed costs in sum of $ 470.74 against pltfs

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 21, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand Delivered; forty copies)

Scott W. Wilson, Esq.
Spencer H. Hipp, Esq.
Littler, Mendelson, Fastiff
& Tichy
701 "B" Street
Suite 300
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 21, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)